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No. 95-1694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Petitioners,

v.

JOHN DOE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to S. Ct. Rule 37.2(b), *amici* American Council on Education ("ACE"), American Association of State Colleges and Universities ("AASCU"), and National Association of State Universities and Land-Grant Colleges ("NASULGC") seek leave to file the attached brief in support of petitioners. *Amici* requested the consent of the parties to this filing and received the consent of petitioners, but not that of respondents.

Amici are major national organizations in the field of higher education and are interested in this case because of its importance to state colleges and universities. *Amicus* ACE, founded in 1918, represents

all sectors of American higher education. Its members are approximately 1700 institutions, including most of the nation's state colleges and universities. ACE's mission is to strengthen America's institutions of higher education by supporting their goals of teaching, research, and public service. *Amicus* AASCU, founded in 1961, represents more than 370 state colleges and universities across the United States. *Amicus* NASULGC, founded in 1887, is the nation's oldest higher education association. Its members include 177 public research universities located in all 50 states.

Amici seek to participate in this case because they and their members are concerned about the adverse consequences to the nation's institutions of public higher education of the rule announced by the court below. *Amici* are uniquely qualified to articulate why Eleventh Amendment immunity is vital to state colleges and universities and why the approach used by the court below to determine the availability of immunity is harmful to these institutions of higher education. In a similar representative capacity, these *amici* have joined in briefs *amici curiae* in this Court previously, the most recent such brief being filed in *United States v. Winstar Corp.*, No. 95-865.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus American Council on Education ("ACE"), founded in 1918, represents all sectors of American higher education. Its members are approximately 1700 institutions, including most of the nation's state colleges and universities. ACE's mission is to strengthen America's institutions of higher education by supporting their goals of teaching, research, and public service.

Amicus American Association of State Colleges and Universities ("AASCU"), founded in 1961, represents more than 370 state colleges and universities across the United States. *Amicus* National Association

of State Universities and Land-Grant Colleges ("NASULGC"), founded in 1887, is the nation's oldest higher education association. Its members include 177 public research universities located in all 50 states. *Amici* ACE, AASCU, and NASULGC are interested in this case because of the direct impact of the rule announced by the court below on the operation, management, and funding of state colleges and universities.

One of the most successful components of American higher education is the extensive system of state-established and state-supported colleges and universities. These institutions include some of the leading centers of teaching and research in the world. There are over 600 public four-year institutions of higher education in the United States and another 1,000 public two-year institutions. Collectively, state colleges and universities are engaged in educating approximately 11 million undergraduate, graduate-level, and professional-school students. [1]/

The decision below is of great concern to *amici* and their members because it is inconsistent with the efforts of state colleges and universities, particularly those with a significant research commitment, to operate their academic and research programs as an efficient integrated whole, not a collection of unrelated parts. University-connected research facilities strengthen faculty teaching and thereby advance student learning. The decision below artificially differentiates among activities of the University of California, recognizing some academic activities as "state functions" for which the university is entitled to Eleventh Amendment immunity while classifying other academic activities as

[1]/ *Digest of Education Statistics 1995*, Tables Nos. 223, 172, National Center for Education Statistics, U.S. Department of Education.

"non-state functions" for which Eleventh Amendment immunity is not available.

SUMMARY OF ARGUMENT

This case presents critical issues of constitutional law on which the circuits are sharply split. The Ninth Circuit decision is flawed both in terms of Eleventh Amendment doctrine and because of the unwarranted exposure to which it subjects state colleges and universities. When a federal court has determined that a university is an "arm of the state," the court should dismiss any action that, if successful, would result in a judgment against the university. To displace this analysis by imposing a multi-factor test, including an inquiry into whether third party indemnification or other non-state funds may be available to satisfy a judgment, compromises states' constitutional immunity from suit in federal court.

This Court has held that the jurisdictional purposes of the Eleventh Amendment are not limited to protecting state treasuries. Rather, the Eleventh Amendment is central to federalism and protects states from the indignity of suit in the federal forum at the instance of private parties. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996). This constitutional immunity from suit, upon which public higher education institutions depend, is vitiated if a state must prove in federal court that there are no third parties and no non-state funds to pay the federal court judgment.

The strained budgets of state colleges and universities derive from hard-gained state legislative appropriations, tuition and fees, private contributions, and public and private grants. The decision below triggers a constitutionally inappropriate inquiry into a state university's funding sources and the allocation of those funds. Plaintiffs will seek to prove that the institution can be sued in federal court because of the existence or even the theoretical availability of non-state

funds to pay a federal judgment. Such an inquiry effectively abrogates a state's immunity from suit and undermines a public university's ability to conduct an integrated program of research and teaching.

ARGUMENT

I. THE COURT SHOULD REVIEW THIS CASE TO RESOLVE A SPLIT IN THE CIRCUITS ON THE PROPER TEST FOR WHETHER A STATE UNIVERSITY IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The frequency of litigation against the nation's hundreds of state colleges and universities underscores the need for uniform constitutional doctrine on when and whether these institutions are subject to suit in federal court. This case presents an opportunity to resolve the conflict between the approach applied in the Ninth and Third Circuits and that applied in the Seventh and Tenth Circuits in determining whether a state university is entitled to Eleventh Amendment immunity.

A. The approach in the Ninth and Third Circuits.

In this case, the Ninth Circuit applied a five factor test to determine whether the University of California is immune from this suit in federal court: "[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity." *Doe v. Lawrence Livermore National Laboratory*, App. at 6a-7a. Of the five factors, the court said that "[s]tate liability for money judgment is the single most important ...." *Id.* at 7a.

The *Doe* majority acknowledged that "the University has been granted Eleventh Amendment immunity in a number of cases," *id.* at 9a (citing cases), but did not follow those authorities, reasoning that "previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation." *Id.* at 9a. The "unique situation" which the court found sufficient to deny Eleventh Amendment immunity was the prospect of third-party indemnification for a judgment against the University of California, an institution otherwise an "arm of the state." *Id.* at 9a.

The Third Circuit has used a similar approach, albeit with a nine-factor inquiry, to analyze whether Rutgers, The State University of New Jersey, was entitled to Eleventh Amendment immunity. *See Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1307 (3d Cir. 1987). No single factor was deemed conclusive, but "perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury...." *Id.* at 1307 (quoting *Urbano v. Board of Managers of the New Jersey State Prison*, 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970)).

The salient common feature of the approach in the Ninth and Third Circuits is that it involves factual inquiry into the source of funds to pay a judgment in each particular suit. *See Doe*, App. at 9a (university not entitled to Eleventh Amendment immunity where federal government would indemnify State); *Kovats*, 822 F.2d at 1308 ("relief should not be viewed as coming from the state where an entity has the ability to pay a judgment from private funds not subject to state control").

B. The approach in the Seventh and Tenth Circuits.

In contrast to the burdensome inquiry to which state universities are subjected in the Third and Ninth Circuits, a more straightforward approach has been

followed in recent Seventh and Tenth Circuits cases. *See Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904 (7th Cir.), *cert. denied*, 502 U.S. 941 (1991); *Mascheroni v. Board of Regents of University of California*, 28 F.3d 1554 (10th Cir. 1994).

These decisions treat Eleventh Amendment immunity as a question of law, not fact; that is, when a state university is sued in federal court, the court examines the legal question of whether, as a matter of state law, the university is an agency or arm of the state. If so, the university is entitled to immunity as a matter of law without regard to the facts of a particular case, including whether the university may have a right to seek reimbursement or indemnification. *See Kroll*, 934 F.2d at 907 ("a state agency *is* the state for purposes of the eleventh amendment") (emphasis in original); *Mascheroni*, 28 F.3d at 1559 (examine state law to determine whether the university is an arm of the state).

As explained below, *amici* strongly support the approach followed by the Seventh and Tenth Circuits, believing that approach consistent with both Eleventh Amendment doctrine and sound university administration. A substantially different approach is followed by these circuits than was applied by the court below, or than would be applied by the Third Circuit. Review is warranted to resolve this conflict. [2]/

[2]/Lower courts have noted the inconsistency in judicial approach to this question of Eleventh Amendment immunity for state colleges and universities. *See Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 301-02 (6th Cir. 1984), (noting that the "great majority" of cases have found public colleges and universities entitled to Eleventh Amendment immunity, but there are cases to the contrary) (citing cases), *cert. denied*, 469 U.S. 1113 (1985); *Kovats*, 822 F.2d at 1312 (same). The large number of cases cited in *Hall* and *Kovats* confirms both the frequency with which state colleges and universities are defendants in federal litigation and the lack of uniformity on a basic jurisdictional principle.

II. THE DECISION BELOW SHOULD BE REVIEWED BECAUSE IT CONFLICTS WITH THIS COURT'S ELEVENTH AMENDMENT DECISIONS AND BECAUSE OF ITS ADVERSE IMPACT ON STATE UNIVERSITIES.

A. The Ninth Circuit approach is inconsistent with Eleventh Amendment immunity.

The court below reasoned that because of the possibility of federal indemnification, the University of California was not entitled to dismissal of plaintiffs' lawsuit. *See* App. at 9a. That rationale is inconsistent with this Court's holdings that the Eleventh Amendment is a jurisdictional limitation on the federal courts which grants the states "immunity from suit in federal court," *see, e.g., Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984), not simply immunity from financial adverse impact.

As this Court recently noted, its Eleventh Amendment cases "have often made it clear that the relief sought by a plaintiff is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe*, 116 S. Ct. at 1124. Because the relief sought is irrelevant to the question of Eleventh Amendment immunity, inquiries about how the state will satisfy a judgment, *i.e.*, what funds will it use and whether they will all originate from the state treasury, are equally irrelevant. Eleventh Amendment immunity does not depend on the nature of the judgment sought, *Seminole Tribe*; *Cory v. White*, 457 U.S. 85, 90 (1982), and thus should not depend on how that judgment will be satisfied.

The consequence of the lower court's decision is a factual inquiry in every case involving a state college, university or other state agency to determine the financial impact on the state treasury of a federal court judgment. To be held immune, state agencies would be

required to prove that the particular activity at issue is largely, if not entirely, state funded, and that substitute private or federal funds are unavailable to satisfy any judgment. That type of inquiry destroys a state's rightful expectation of immunity from suit in federal court.

The states' constitutional expectation of "immunity from suit" should include certainty that immunity will be consistently and promptly afforded. A complex, multi-factor test to determine the fundamental jurisdictional power of the federal court over an agency of the state invites litigation, produces inconsistent results, and thus ultimately denies a state the assurance of immunity to which it is constitutionally entitled. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1055 (1995) ("[T]he proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal."); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 376 (1959) ("[S]ound judicial policy does not encourage a situation which necessitates constant adjudication of the boundaries of state and federal competence.").

Rather than determining immunity on a preliminary motion to dismiss, the Ninth Circuit approach invites protracted litigation. Plaintiffs will conduct wide-ranging discovery on, for example, university funding and fiscal matters. The district court will then hold a mini-trial on the fiscal impact on the state (*i.e.*, "whether a money judgment would be satisfied out of state funds," *Doe*, App. at 6a) before the court considers dismissing under the Eleventh Amendment. A state university subjected to this type of federal court scrutiny enjoys no "immunity from suit."

Further, even if non-state funds are available to satisfy a judgment, that does not mean that being involved in federal litigation has no adverse impact on

the state treasury. The state would, in virtually all instances, still bear the substantial costs of federal court litigation, including the costs of litigating the issue of immunity in advance of the merits. Imposition of these costs is an indignity beyond the more fundamental federalism concern of "making one sovereign appear against its will in the courts of the other." *Pennhurst*, 465 U.S. at 100 (citation omitted). [3]/

B. The Ninth Circuit approach is uniquely inappropriate when applied to state colleges and universities.

To maintain a state university, particularly one of the scope and excellence of the University of California, appropriated state funds must be supplemented by student fees, private contributions, and private and federal grant funds. Under the Ninth Circuit approach, this mixed funding alone permits plaintiffs to argue that any federal judgment will not "be satisfied out of state funds." Because money is fungible and part of every state university's budget is non-state funds, universities will be hard pressed to prove that judgments cannot be paid unless only state funds are used.

This fixation on the state treasury is inconsistent with both Eleventh Amendment doctrine and sound educational policy. State university administrators should be encouraged to enhance their institutions by supplementing taxpayer funds with funds from other sources. Moreover, research facilities like the Lawrence Livermore Laboratory are integral to the academic and intellectual life of a university without regard to their source of funding. Research is not incidental to the

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[3]/The Ninth Circuit's approach of requiring a mini-trial before immunity is determined is similarly inconsistent with this Court's qualified immunity doctrine. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). There, as with the Eleventh Amendment immunity, the immunity is "an *immunity from suit* rather than a mere defense to liability...." *Mitchell*, 472 U.S. at 526 (emphasis in original).

teaching of students; it is an essential element of teaching. To fulfill their academic mission, state colleges and universities must and invariably do obtain non-state financial support for research facilities, faculty salaries, and other purposes.

The lower court reasoned that a state university loses its Eleventh Amendment immunity in connection with a research program (and by extension other activities) to the extent that the university obtains non-state funding for these activities. This approach impedes public universities from performing their mission by denying them Eleventh Amendment protection. The doctrinally more sound approach is to determine a public university's status by reference to state law without regard to the funding of particular activities. A broader and more complex inquiry undermines a public university's educational mission and is inconsistent with the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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